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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 14 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner identified himself as a research scientist and imaging analyst at the Cardiovascular and Imaging Research Foundation of New York (CIRF), in New York, New York. U.S. Citizenship and Immigration Services (USCIS) records indicate that the petitioner currently holds H-1B nonimmigrant status permitting him to work at the [redacted] The record before the AAO does not reveal the nature of the petitioner's most recent work at the Mayo Clinic. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a personal statement and two witness letters.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on December 7, 2007. At that time, counsel stated:

> [The petitioner] seeks employment in the field of biomedical research. Specifically, [the petitioner's] recent research at the Burnham Institute for Medical Research was focused

> on the mechanisms underlying pathogenesis of motor neuron diseases including late-onset Amyotrophic Lateral Sclerosis (ALS) and early-onset Spinal Muscular Atrophy (SMA). The goal of the research is to identify molecular targets for early detection and therapeutic treatment of motor neuron diseases.

Counsel then discussed ALS and SMA at length, although the petitioner was no longer working with those ailments at the time he filed the petition. Counsel then stated that the petitioner

> has also delved into another intriguing field, the generation of biological pacemaker cells for the treatment of cardiovascular diseases. . . . [The petitioner] has established a complex *in vitro* co-culture system of neural crest cells (NCC) and cardiomyocytes derived from embryonic stem cells (ESC). His findings significantly advanced the studies in the generation of biological pacemakers.

Both of the above projects took place at the [redacted] where the beneficiary trained as a postdoctoral research fellow from 2002 to 2006. He subsequently worked at the [redacted] from November 2006 to April 2007, and at CIRF thereafter, but counsel's introductory letter did not address this more recent work.

On Form ETA-750B, Statement of Qualifications of Alien, the petitioner provided the following description of his most recent work:

> Imaging analysis and clinical research on different cardiovascular imaging modalities including CT angiography (CTA) and Magnetic resonance angiography (MRA) to assess and develop novel diagnostic examination technologies for cardiovascular diseases. Projects include: CTA application in US Medicare patients, anomalous origin of coronary artery, cardiac functional and aortic parameters, etc.

The petitioner submitted five witness letters. Like counsel's letter, these letters focused on work that the beneficiary performed at the BIMR; four of the five witnesses are current or former BIMR researchers. The witnesses did not mention the petitioner's work after he left the BIMR, or explain how his work at the BIMR relates to his current efforts.

[redacted], an associate professor at BIMR, stated that the petitioner "is conducting innovative research in the field of neuroscience relating to motor neuron degenerative diseases." The record contains no evidence that the petitioner was still pursuing such research as of late November 2007, when [redacted] wrote that letter. The petitioner's own description of his then-current work at BIMR did not mention neuroscience or degenerative diseases. [redacted] also stated that the petitioner "has, over the course of more than 4 years, become an indispensable member of our research team," and consistently referred to the petitioner as though the petitioner still worked at BIMR in late 2007, even though the petitioner himself claimed to have left that institution in October 2006.

Regarding the petitioner's work at [redacted]

> [The petitioner] joined my laboratory in December 2002. . . .
>
> Amyotrophic lateral sclerosis (ALS) and Spinal Muscular Atrophy (SMA) are one [*sic*] of the major neurodegenerative diseases alongside Alzheimer's disease and Parkinson's disease. . . . [The petitioner's] research work and his important research contributions focus on molecular and cellular mechanisms of these motor neuron diseases. . . . Currently, there is no treatment that substantially slows motor neuron diseases progression. The progress in our understanding of the pathogenesis of the disease will lead to new and effective treatments. . . .
>
> The research in the area of a novel protein membralin holds the key to achieving the goal of curing or preventing the disease of motor neuron degeneration. . . . [T]o make better use of biotechnology to serve our needs, we need to know the mechanisms governing the malfunction of membralin in motor neuron degeneration. [The petitioner] has made major strides in this area. He is the first to discover the involvement of membralin in the pathogenesis of motor neuron degeneration. . . . The result of [the petitioner's] research provides direct information on the possible therapies and prevention for motor neuron diseases.

[redacted] declared plans to publish the petitioner's work in the [redacted]

[redacted] repeated the assertion that the beneficiary's work with membralin "is currently being written for publication in a major neuroscience journal such as [redacted] He further stated:

> [redacted]
>
> [E]lectronic implantable pacemakers have multiple associated risks . . . and require frequent power source changes. . . . A better therapy for such diseases would be to repair or replace the defective pacemaking/conducting cells. . . . [The petitioner's] findings have provided for the first time evidence that will help to elucidate the mechanisms of development of sino-atrial pacemaker cells of embryonic hearts in order to develop biological pacemaker cells from embryonic stem cells for future human therapy.

[redacted] assistant professor at [redacted] stated that the petitioner's "in vitro co-culture system to study [the] fate of the pacemaker cells . . . may suggest strategies for developing efficient and neuro-coupled cardiac pacemakers from" embryonic stem cells. [redacted] stated: "I am confident that his publications will soon appear in prestigious and authoritative journals, such as the [redacted]"

[redacted], now an associate professor at the [redacted] stated:

> I have known [the petitioner] for more than seven years. I came to know him in [redacted] when he joined the [redacted] . . We had regular joint lab meetings. . . . We had further collaborations in the U.S. from 2002 [to] 2006, when both of us joined The [redacted] as postdoctoral research scientists. During his stay at The [redacted] he made several major accomplishments, which have contributed greatly to our understanding of neurodegenerative diseases, especially in motor neuron diseases. These works conducted by [the petitioner] have established himself as a leading scientist in the neuroscience research fields.

[redacted] stated that the petitioner's work with membralin "changed our understanding in this scientific puzzle" and "has given us a completely new scope of knowledge to understand" "human motor neural diseases," and that the petitioner's "promising findings . . . significantly advanced the studies in the generation of biological pacemakers."

The only witness who was not working at [redacted] while the petitioner was there is [redacted] *Curricula vitae* in the record show that [redacted] worked with [redacted]'s postdoctoral appointment at [redacted] and that the two researchers collaborated on a 2004 article in [redacted] did not claim expertise relating to motor neuron diseases or cardiac pacemaker cells. [redacted] stated: "My research efforts have focused on the early detection of gastric cancer. . . . My other research interest is to use genomics and proteomics to study Traditional Chinese Medicine." Regarding the petitioner's work, [redacted] stated:

> Our shared research interests [in] discovering diseases related human genes [*sic*] have drawn my attention to [the petitioner's] work, which I believe has added significant insights to the fields [of] human genomics and neuroscience. . . . [The petitioner's] work has inspired my own research. . . .
>
> [The petitioner's] work has provided scientists in the area a promising path to study . . . neurodegenerative diseases. [The petitioner's] efforts will soon be published in a highly prestigious, peer-reviewed [redacted]

Almost all of the witnesses asserted that the beneficiary's work was soon to be published in the *Journal of Neuroscience*, but the record contains no evidence that the journal accepted or published the article. The petitioner's *curriculum vitae* lists eight items under the heading "publications." Four of the listed items were conference presentations. The remaining four items were listed as "submitted" or "in preparation." This indicates that, at the time the petitioner filed the petition, he had not had any full articles published in any peer-reviewed scholarly journal.

On March 4, 2009, the director instructed the petitioner to submit evidence of the impact of his work in the field. In response, counsel discussed "advances achieved in [redacted]s laboratory" in the years since the petitioner left that laboratory, and asserted that this progress "demonstrate[s] the major impact made by [the petitioner] through his research," without which
In his second letter, [redacted] stated:

> [The petitioner] was the first to discover the involvement of membralin in the pathogenesis of motor neuron degeneration. The result of [the petitioner's] research provided direct information on the possible therapies and prevention for motor neuron diseases.
>
> Following [the petitioner's] ground-breaking work on membralin, my group has since identified an important link to its biological function in motor neuron survival. We have found that membralin interacts with a protein termed survival motor neuron (SMN), which is the causal gene for spinal muscular atrophy. Given the similarity of the disease phenotype between the membralin and SMN null mice, membralin may play a role upstream of SMN in motor neuron survival. We have also determined that membralin resides in the endoplasmic reticulum (ER) membrane and, therefore, the interaction of membralin with SMN points to the critical role of these two proteins in ER function. . . .
>
> Without [the petitioner's] past research contributions, we could not have reached our current level of understanding of motor neuron disease and its underlying molecular mechanisms.

The petitioner's response to the director's notice consisted, in effect, of the assertion that the laboratory where the petitioner used to work continues to research membralin. [redacted] asserted that his laboratory has begun "collaborating with [redacted], an associate professor and a pediatric neurologist in the [redacted] The petitioner submitted a printout regarding [redacted] web site, but nothing from [redacted] herself to discuss the nature of the stated collaboration or the significance of the beneficiary's work in that collaboration.

The director denied the petition on July 9, 2009, stating that the petitioner's witness letters failed to establish the significance or impact of the petitioner's work. The director also noted the apparent absence of published articles by the petitioner at the time of filing.

On appeal, the petitioner protests "the misjudgment of the significance of my work on motor neuron degenerative disease associated with a novel mice model based on my study of the gene membralin." The petitioner does not claim that he is still involved in that project, and he does not even describe his more recent work, let alone establish its importance. The national interest waiver is not simply a reward for past work, but a means by which the United States can secure the continued services of aliens whose work substantially sets them apart from their peers.

The petitioner asserts that his work on the "membralin project" has yielded a "manuscript [that] will soon be published in the leading peer-reviewed journal – [redacted]." In this way, the petitioner echoes unsubstantiated claims from twenty months earlier. The record does not contain any evidence from the publisher of the [redacted] to confirm the claim that the petitioner's article "will soon be published" in that journal.

The petitioner submits two letters that are dated before the petitioner responded to the March 2009 request for evidence, but which did not accompany that response. [redacted]ssistant clinical professor of neuroradiology at the [redacted] states:

> I completed a post-doctoral research fellowship at The [redacted], where I had the pleasure to become intimately acquainted with [the petitioner] and his scholarly work. . . .
>
> The result of [the petitioner's] research provides direct information on possible therapies to prevent this class of motor neuron diseases. . . . [The petitioner's] research is of specific and primary interest to the pharmaceutical industry, as well as to the nation as a whole. . . . [The petitioner's] work will soon be published in a leading peer-reviewed international journal – *Journal of Neuroscience*."

[redacted]tates:

> [O]ne of the most frustrating predicaments besetting research on motor neuron degeneration is the inadequacy of proper tools to elucidate the mechanism by which this human disease progresses. . . . [The petitioner's] membralin knockout mice model has provided us with such a possibility. We have been watching his progress in the past few years and the recent new findings have lighted up our hope. . . . [The petitioner's] latest study has also shown the membralin mutation in human patients and is leading the project to a more clinical direction.

The references to the petitioner's "latest study" and his "progress in the past few years" are not entirely clear. As we have already observed, the beneficiary had left [redacted] in 2006, more than a year before he filed the petition, and his own description of his subsequent work gave no indication that he continued to perform research related to degenerative neurological disorders.

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion

that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The petitioner, in this proceeding, has overwhelmingly relied on letters from witnesses from [redacted] who worked directly with the petitioner and who claim, in the absence of any corroborating evidence, that the publication of the beneficiary's work in the [redacted] has been imminent since 2007. None of the letters contain any specific reference to work the petitioner has undertaken since 2006. Assertions regarding the great significance of the petitioner's work at [redacted] fail to account for the apparent lack of any published articles, or even conference presentations, relating to that work.

The petitioner, on appeal, asserts that "consideration of confidentiality of the unpublished intellectual property" has "temporarily" resulted in "limited accessibility" of the petitioner's findings, an assertion that appears to be in direct opposition to the assertion that his work at [redacted] has already had a significant impact on neurological research. Assuming that confidentiality concerns have prevented wider distribution of the petitioner's findings, this would necessarily limit the opportunities for the petitioner's work to influence others in the field. As it stands, the record contains very little evidence of awareness of the petitioner's work outside of [redacted], and no evidence of the significance of the petitioner's work for a succession of subsequent employers.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.